

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ZUNUM AERO, INC.,

Plaintiff,

v.

THE BOEING COMPANY, et al.,

Defendants.

CASE NO. C21-0896JLR

ORDER

Before the court is Defendants The Boeing Company and Boeing HorizonX Ventures, LLC's (together, "Boeing") "supplemental trial brief," which the court construes in relevant part as a motion for leave to assert two previously unpled affirmative defenses concerning preemption. (Supp. Tr. Brief (Dkt. # 636) at 5-11; Reply (Dkt. # 657); *see also* 2d Am. Compl. (Dkt. # 60); Answer (Dkt. # 118).) Plaintiff Zunum Aero, Inc. ("Zunum") opposes the motion. (Resp. (Dkt. # 655).) The court has considered the parties' submissions, the relevant portions of the record, and the governing

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1 law. Being fully advised, the court DENIES Boeing's motion for leave to assert  
2 previously unpled affirmative defenses.

3 Boeing answered Zunum's second amended complaint on December 17, 2022.  
4 (*See generally* Answer.) In its answer, Boeing listed 28 "Defenses." (*See id.* at 60-63.)  
5 Preemption is absent from that list. (*See id.*) Indeed, Boeing does not mention  
6 "preemption" at all in its answer. (*See generally id.*) On February 28, 2024, Boeing  
7 moved for summary judgment. (MSJ (Dkt. ## 336 (sealed), 357 (redacted)).) Boeing did  
8 not argue preemption in that motion. (*See generally id.*) On April 25, 2024, the parties  
9 filed a joint proposed pretrial order, which makes no mention of preemption. (*See*  
10 *generally* Prop. Pretrial Order (Dkt. # 588).) On May 10, 2024, Boeing filed its trial  
11 brief. (Def. Tr. Br. (Dkt. ## 612 (redacted), 614 (sealed)).) Again, there was no mention  
12 of preemption. (*See generally id.*) It was not until after close of business on May 14,  
13 2024, less than 48 hours before trial was set to begin, that Boeing first asserted  
14 preemption defenses in this case. (*See* Supp. Tr. Br. at 5 (arguing that "patent law  
15 preempts Zunum's misappropriation claim based on Boeing's patents" (capitalization  
16 altered)); *id.* at 7 (arguing that "the Washington Uniform Trade Secrets Act ("WUTSA")  
17 preempts Zunum's tortious interference claim" (capitalization altered)).)

18 "Preemption is an affirmative defense[.]" *Cohen v. ConAgra Brands, Inc.*, 16  
19 F.4th 1283, 1289 (9th Cir. 2021); *see also MM&R Prods., Inc. v. Stitch N' Genius, Inc.*,  
20 No. CV 09-4082-VBF(RCx), 2009 WL 10698827, at \*5 (C.D. Cal. Sept. 10, 2009)  
21 ("Preemption by federal patent law is an affirmative defense."); (Supp. Tr. Br. at 10  
22 (Boeing acknowledging WUTSA preemption as an "affirmative defense")). Federal Rule

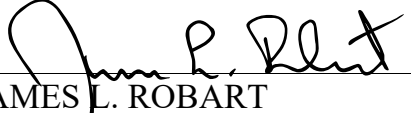
1 of Civil Procedure 8(c) provides that, “[i]n responding to a pleading, a party must  
 2 affirmatively state any avoidance or affirmative defense.” Fed. R. Civ. P. 8(c)(1).  
 3 Relatedly, Federal Rule of Civil Procedure 16 governs pretrial orders. *See* Fed. R. Civ. P.  
 4 16(d)-(e). “A pretrial order has the effect of amending the pleadings and controls the  
 5 subsequent course of action in the litigation.” *Nw. Acceptance Corp. v. Lynnwood*  
 6 *Equipment, Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) (cleaned up). Failure to plead an  
 7 affirmative defense typically results in waiver of that defense, *Wakefield v. ViSalus*, 51  
 8 F.4th 1109, 1119 (9th Cir. 2022), as does the failure to raise the affirmative defense in the  
 9 pretrial order, *Nw. Acceptance Corp.*, 841 F.2d at 924. A defendant may avoid waiver of  
 10 an unpled affirmative defense “if the plaintiff is not unfairly surprised or prejudiced” by  
 11 the delay in raising the defense. *Lowerison v. Cnty. of San Diego*, 26 F. App’x 720, 721  
 12 (9th Cir. 2002) (citing *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993)). And  
 13 “[t]he court may modify the [pretrial] order issued after a final pretrial conference only to  
 14 prevent manifest injustice.” Fed. R. Civ. P. 16(e). The decision to allow a party to assert  
 15 an untimely affirmative defense is committed to the district court’s sound discretion. *See*  
 16 *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (pleadings); *see also* *Nw.*  
 17 *Acceptance Corp.*, 841 F.2d at 926 (pretrial order).

18       The court finds that Zunum has and would continue to suffer undue prejudice as a  
 19 result of Boeing’s pursuit of these affirmative defenses. Trial is underway, and Zunum  
 20 has already had to dedicate attorney hours to respond to Boeing’s belated motion.  
 21 Zunum is also correct that “Boeing’s last-minute motion prejudices Zunum’s substantive  
 22 right to develop alternative theories of tort and contract liability that would not be

1 preempted.” (*See* Resp. at 3.) Zunum has less than 10 hours of trial time remaining to  
2 put on its case. The court declines to force Zunum to rethink its trial strategy in the  
3 middle of its case in chief. *See Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 450  
4 (1st Cir. 1995) (affirming the district court’s denial of leave to amend based on ERISA  
5 preemption argument filed five days before trial). Moreover, Boeing has not  
6 demonstrated that amending the pretrial order to permit it to assert its preemption  
7 defenses is necessary to avoid manifest injustice. Fed. R. Civ. P. 16(e).

8 For the foregoing reasons, the court DENIES Boeing’s motion (Dkt. # 636).

9 Dated this 21st day of May, 2024.

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11 JAMES L. ROBART  
United States District Judge  
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